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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 515

BONWIT TELLER, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DRECHSLER & LEFF,
Attorneys for Bonwit Teller, Inc.

SIDNEY ORENSTEIN,
MORTIMER HOROWITZ,
DAVID DRECHSLER,
of Counsel.

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Bonwit Teller, Inc., petitioner herein, prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the decree of that court entered on October 15, 1952, insofar as that decree remands the cause which was the subject of an order of the National Labor Relations Board (hereinafter called the "Board"), dated October 2, 1951, under Section 10 of the Labor Management Relations Act of 1947 (hereinafter called the "Act"), with directions to proceed in accordance with the opinion of the Court.

Opinions Below

The opinion of the Circuit Court of Appeals (R. Vol. II, 100-111)[1] is reported in 197 F. (2d) 640. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. Vol. I, 2a-21a) are reported in 96 NLRB 608.

Jurisdiction

The decision of the Court of Appeals was rendered on June 17, 1952 and its decree was entered on October 15, 1952. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. Sec. 1254(1) and Section 10(e) of the Labor Management Relations Act of 1947.[2]

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[1] R. designates references to the record consisting of proceedings in the United States Court of Appeals, Second Circuit and to portions of the record printed below.

[2] In remanding the proceedings of the Board with directions to proceed in accordance with its opinion the Court stated:

> "However, the Board's order in its present form has been too broadly drawn. It requires Bonwit Teller to cease and desist from: '* * * making anti-union speeches to the Respondent's employees during working hours and on the Respondent's premises, without according, upon reasonable request, a similar opportunity to address the employees to the labor organization against which such speeches are directed.' As we have indicated above, the violation here was the discriminatory application of the no-solicitation rule. If Bonwit Teller were to abandon that rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time Rudolph made an anti-union speech. Nothing in the Act nor in reason compels such 'an eye for an eye, a tooth for a tooth' result so long as the avenues of communication are kept open to both sides."

On the issue involved what the Court did is in effect to suspend the enforcement of the Board's order pending its modification by the Board, a task it itself has done, on another occasion: *NLRB* v. *Clark Brothers Co., Inc.*, 163 F. (2d) 373. In any event an order of the Circuit Court of Appeals to remand a cause to the Board is reviewable by certiorari. *NLRB* v. *Ford Motor Co.*, 305 U. S. 364, 371-4. See also *NLRB* v. *Indiana and Michigan Electric Co.*, 318 U. S. 2.

Questions Presented

1. Whether an employer commits an unfair labor practice in violation of the Act and furnishes a valid reason for setting aside an employee election by addressing his employees in non-coercive terms on company time and premises because no similar opportunity is extended to the Union involved in the election to address the employees on company time and property where

(a) a no solicitation rule, legitimately applied in the business of the employer, exists which seeks to prevent non-employee or outside union organizers from access to employees on company time and property but where

(b) the employer's business is located in a metropolitan center, where the union's outside organizers have, in fact, had for a long period of time abundant and unlimited access to and contact with the employees on the streets adjoining the employer's business and in neighboring meeting halls both before and after the employer's talk to the employees.

2. Whether Section 8(c) of the Act affords an employer the right to address his employees on company time and property without the necessity of extending a similar right to the union to address the employees on company time and property under the circumstances delineated in question 1.

3. Whether a finding that a no-solicitation rule was discriminatorily applied could be made by the Board when no allegation to that effect was ever made in the complaint and evidence related thereto was specifically excluded by the Trial Examiner.

4. Whether an employer, who is prevented from addressing his employees on company time and property unless he extends a similar right to the union under circumstances

of the instant case, is deprived of his constitutional right to free speech and of his property without due process of law.

5. Whether employer utterances, which do not constitute unfair labor practices, may, nevertheless, constitute reasons for setting aside a representation election.

6. Whether setting aside of a representation election is subject to judicial review when it constitutes part of the record of a consolidated complaint and representation proceeding.

7. Whether conduct of a substantial part of a hearing during a vacancy in the post of the statutory office of the General Counsel constitutes a violation of Section 3(d) of the Act.

Statutes Involved

The pertinent provisions of the Labor Management Relations Act of 1947 are set forth in the Appendix.

Statement

As the Court below stated, the facts in the instant case are substantially undisputed. Bonwit Teller, Inc. operates department stores in various cities in the United States. The proceedings in the instant case arise out of occurrences in the Employer's department store in New York City and White Plains, New York (R. Vol. II, 101-107).

On June 30, 1949, an election was conducted among the employees in the two stores to determine the collective bargaining representatives pursuant to an order of the National Labor Relations Board. The contending unions were the Amalgamated Clothing Workers and the Retail Clerks or RCIA, as it will be hereinafter referred to. The results of the election were inconclusive and a run-off election was conducted on September 15, 1949, in which the employees voted whether they wished to be represented by the RCIA.

Out of approximately 1,011 eligible votes RCIA received 225 votes and 668 votes were cast against the participating labor organization.

For nearly nine months prior to the election on September 15, 1949 an active unionizing campaign was carried on by the RCIA among the employees of the Employer without any attempt by the Employer to counteract it. Wishing to present the Employer's point of view in regard to the prospective election, Roy Rudolph, President of the Employer, read, on Friday, September 9, 1949, to the employees of the New York store, a written speech. The same speech was delivered to the employees of the White Plains store on September 10, 1949.

Around 4:30 P. M. on September 9, 1949 the employees in the New York store were informed that Rudolph would address them on the main floor of the store and that this would take place at 5:00 P. M., a half hour before the usual closing time. At 5:00 P. M. the customers' entrance was closed, so that no more customers would be admitted. Those inside continued to be waited on. After delivering the speech, Rudolph left and the meeting terminated. Meetings under similar circumstances but not on the subject of unionization have taken place before at the store of the petitioner, during which Rudolph addressed the employees. The employees were invited to attend the meetings but the employees were free to leave the store. Employees who were busy on their jobs did not attend the meeting. Employees were given permission to leave the building. The employees remaining in the building were not compelled to attend the meeting on the first floor.

The Board did not proscribe nor find illegal "the manner in which it [the Employer] assembled its audience". As the Court stated, "The Board made no finding that the employees were compelled to attend this meeting and we may assume that the employees were urged to go to the meeting, although they were free to leave the store if they wished to do so" (R. Vol. II, 103). As the Court below further stated, in the days subsequent to the main meeting "Rudolph

met informally with groups of employees in departmental meetings and discussed with them working conditions then prevailing in the stores and continued to urge them to vote against the Union."

On September 12th the Union requested the Employer for an opportunity to address all of the Employer's employees at the New York store "on Wednesday, September 14, 1949 at 5:00 P. M. or at some time before the date of the run-off election on September 15, 1949 which will be mutually convenient to both of us. I further request that you accord me the same privilege afforded to them during working hours so that I will be assured of the same complete audience of which you availed yourself." No such permission to the Union was given by the Employer.

In regard to the contents of Rudolph's speech, the Board found that the last paragraph contained a promise of a wage raise to employees which violated Section 8(a) (1) of the Act. The Board found also that certain statements by two supervisory employees were similarly objectionable. However, the Court below found that the findings of the Board with regard to the alleged objectionable promises of benefit in Rudolph's speech and in the statements of the supervisors were erroneous. As the Court stated, "To forbid such communications would seem to prohibit all discussions between employer and employee of issues germane to the subject of unionization."

With regard to the main issue remaining in the instant appeal, the Board held that the fact that communications were made on company time and property constituted per se a violation of Section 8(a) (1) of the Act and grounds for setting aside the election because the Employer had a duty to grant the Union opportunity to address the employees at a convoked assembly on company time and premises similar to the audience addressed by the Employer.

The Court below sustained the Board's holding solely on the ground that a no-solicitation rule was applied by the Employer which sought to keep outside Union organizers, as distinguished from employees, from soliciting employees on company time and store premises.

Judge Swan, dissented on the ground that by Section 8(c) of the Amended Act "Congress intended the employer to have the right to address his employees on company time and property" without according to union representatives a similar opportunity. He considered the no-solicitation rule irrelevant, citing with approval Board member Reynolds who dissented:

> "The legislative history attendant the enactment of Section 8(c) is replete with assurances that its passage would guarantee free speech to employers in labor disputes. That this freedom of speech encompassed the right to address employees in the plant, as did Respondent's President, is beyond question. Nowhere in the Act or in its legislative history, however, does it appear that a concomitant of this right is the obligation to provide a forum of debate for unions. Indeed, hinging an employer's right to speak upon his readiness to make available the means by which his arguments, views, and opinions can be nullified, effectively emasculates Section 8(c) as it applies to the right of an employer to address his employees."

Specification of Errors To Be Urged

The Court erred:

1. In holding that the Employer committed an unfair labor practice in violation of Section 8(a)(1) of the Act and had furnished valid reasons for setting aside an employee election by addressing his employees on company time and premises because no similar opportunity was extended to the Union involved in the election to address the employees on company time and property where (a) a no-solicitation rule, legitimately applied in the business of the Employer, existed which sought to prevent outside Union organizers from access to employees on company time and property, but where (b) the Employer's business is located in a metropolitan center, where the Union's outside organizers have, in fact, had for a long period of time

abundant and unlimited access to and contact with the employees on the streets adjoining the Employer's business and in neighboring halls both before and after the Employer's talk to the employees.

2. In holding that neither Section 8(c) of the Act nor any issue of employer free speech is involved in the case.

3. In holding that the Employer committed unfair labor practices in discriminatorily applying a no-solicitation rule when no allegation pertaining to the no-solicitation rule was ever lodged in the complaint and evidence relating thereto was specifically excluded by the Trial Examiner.

4. In failing to hold that Section 8(c) of the Act was intended to and did afford the Employer the right to address his employees on company time and property without the necessity of extending a similar opportunity to the Union under the circumstances of this case.

5. In failing to hold that the Employer was entitled to address his employees on company time and property without extending a similar right to the Union under the circumstances of the instant case by reason of his constitutional right to free speech and by reason of his right not to be deprived of his property without due process of law.

6. In failing to hold that an employer's utterances which do not measure up to unfair labor practices may not constitute reasons for setting aside a representation election.

7. In failing to hold that setting aside of a representation election is subject to judicial review when it constitutes part of the record of a consolidated complaint and representation proceeding.

8. In failing to set aside the proceedings because the Board lacked a General Counsel during a substantial part of the hearing before the Trial Examiner.

9. In remanding the case to the Board for further proceedings.

Reasons for Granting the Writ

The questions decided by the Court below and presented in the instant petition are important issues of federal law which have not been but should be settled by this Court. On the main issue of the case, that of freedom of speech, a conflict exists between the decision of the Court below and that of another circuit. There is a like conflict between the decision of the Circuit Court and that of the Board itself. The confusion is rendered total by the tergiversation of the Board on the issue which bodes no optimism for certainty in the future.

1. The Court's declaration that neither Section 8(c) nor any issue of employer free speech is involved in this case is at variance with the facts, the law and the relevant decisions.

In *Virginia Power Co.*, 314 U. S. 469, 476 this Court held that the Employer's right to address his employees on matters of labor policies or problems is a constitutional guarantee which the Act does not enjoin. In *Thomas* v. *Collins*, 323 U. S. 516 this Court, in commenting favorably upon the doctrine of *American Tube Bending*, 134 F. (2d) 993, reiterated this principle.

Section 8(c) of the amended Act, which was not present in the original National Labor Relations Act, sought to make explicit the legislative expression of the constitutional guarantee of employer free speech:

> "SECTION 8(c): Another amendment to this section would insure both to employers and labor organizations full freedom to express their views to employers on labor matters, if they refrain from threats of violence, intimidation of economic reprisal, or offers of benefit. The Supreme Court in Thomas v. Collins (323 U. S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the Ameri-

> can Tube Bending case (134 F. 2 993). The Board has placed a limited construction upon the decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (Monumental Life Insurance, 69 N. L. R. B. 247) *or if the speech was made in the plant on working time* (Clark Brothers. 70 N. L. R. B. 60). The committee believes these decisions to be too restrictive and in this section, provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement * * *" (Senate Report No. 105 on S. 1126, Legislative History of the Labor Management Relations Act, 1947, p. 429). (Italics supplied.)

It will be noted that the Congressional intent to lift the N. L. R. B. ban on employer communications made to the employees "in the plant on working time" was not qualified by any reservation that the employer could exercise that right only if the employer accorded the same right to a labor organization. The employer's right in this respect as to time and place was made absolute and unqualified. The Congressional mandate to this effect would be a nullity if it were held that the employer could exercise his constitutional privilege of free speech only at the price of providing the same facilities to the union.

In *S. & S. Corrugated Paper Machinery Co. Inc.*, 89 N. L. R. B. 1363, indistinguishable in the crucial facts from the instant case, the Board obeyed the Congressional mandate:

> "The Regional Director found that two pre-election speeches made by the President of the Employer to its employees during working hours, although constituting 'captive audience' speeches, were within the bounds of free speech. However, he further found that the Employer, by ignoring the Petitioner's request for a like opportunity to address the employees after they had been subjected to a 'captive meeting' interfered with the employees' free choice of a bargaining agent, and that such interference affected the results

> of the election. The Employer has excepted to this finding, arguing, (1) that the speeches were not made to 'captive audiences', and (2) that, assuming attendance at the meetings was compulsory, the theory advanced by the Regional Director can no longer be relied upon since the Board's decision in the Babcock & Wilcox case. In that case the Board held that Section 8(c) of the amended Act and its legislative history make it clear that the 'compulsory audience' doctrine of the Clark Bros. case no longer exists as a basis for finding unfair labor practices, under circumstances substantially similar to those presented in this case. The decision in the Babcock & Wilcox case is controlling here. On the facts revealed by the Regional Director's Report in this case, the 'captive audience' aspect of the Employer's speeches, otherwise protected by Section 8(c) of the amended Act cannot form the basis for a finding that the Employer, by denying the Petitioner an equal opportunity to use its facilities and time, has interfered with the employees' free choice of a bargaining representative. The Petitioner's objections to the conduct of the election on this ground are therefore overruled" (p. 1364).

The Court's decision grounds its holding on the existence of a no-solicitation rule at the Employer's department store which prevented outside union organizers from access to employees within the store. It may first be stated that the Board's and the Court's decisions on the point of the no-solicitation rule are procedurally defective because the Board has no power to decide an issue which was not lodged in the complaint, in the charge, or even complained of by the Union in its dealing with the Employer. Indeed, evidence relating to the no-solicitation rule was specifically excluded by the Trial Examiner (R. Vol. I, 104a-114a).

Procedural considerations aside, the Employer's no-solicitation rule, even on the merits, cannot constitute an unfair labor practice and the reason for denying the Employer the exercise of his constitutional right to free speech. The Board's and the Court's opinions indicate vital misconceptions in regard to the applicable law pertaining to

no-solicitation rules. They confuse the clearly distinguishable cases of employee solicitors and non-employee organizers. In the instant case the no-solicitation rule did not apply to union organizers who were employees. It only sought to prevent non-employee union organizers from contact with the employees in the department store on company time, when sufficient opportunity for access to employees existed outside company premises. To that extent the decisions of this Court in *Republic Aviation* and *LeTourneau,* 324 U. S. 793, are inapplicable for, in those cases, the no-solicitation rules which were held invalidly applied, concerned employee solicitors. The rule in such cases is that employee organizers may solicit on company premises but not during working hours.

In regard to non-employee union organizers, a quite different rule obtains. When employees are stuck away in a company town or a lumber camp, where access to them by outside union organizers can be had only on company premises, the employer's right of ownership must give way to the right of the employees to have access to the outside world in order to function as free citizens. *Lake Superior Lumber Corp.,* 70 NLRB 178. *West Kentucky Coal Co.,* 10 NLRB 88, 176 F. (2d) 816; *NLRB* v. *Stowe Spinning Co.,* 336 U. S. 226. See also *Marsh* v. *Alabama,* 326 U. S. 501 and *NLRB* v. *Waterman Steamship Corp.,* 309 U. S. 206. The case of *NLRB* v. *American Furnace Co.,* 158 F. 2d 376, cited by the Court below, involved solicitation by an employee organizer and hence is not apropos of the issue in the instant case.

The reason for the rule in the company town cases is not to equalize the facilities for propaganda of the union and of the employer, but to prevent the employer's ownership of the premises on which the employees live from acting as a bar to the employees' access to outside organizers. In *N. L. R. B.* v. *Stowe Spinning Co.,* supra, the Court upheld a Board ruling that an employer discriminated against a union in refusing to rent a meeting hall to the

union where "no other halls were available for organization" (p. 233). The Court explicitly ruled that

> "We cannot equate a company dominated North Carolina mill town with a vast metropolitan center where a number of halls are available within easy reach of prospective union members."

In the absence of employee isolation, the Board and the Courts have permitted the institution of a no-solicitation rule, particularly in department stores. In *Marshall Field & Company* v. *N. L. R. B.*, November 14, 1952, the Seventh Circuit Court of Appeals ruled that a no-solicitation rule of a department store, virtually identical with the one in the instant case, insofar as it denies non-employee union organizers access to cafeterias and restaurants set aside for employees only is not violative of Section 8(1) of the Act because there was no unique handicap to self-organization. As the Court declared:

> "The employees are not so isolated from outside contacts as to justify non-employee organizers having access to the cafeterias which are set aside for employees only."

In the instant case the Employer's store is located in a metropolitan district where meeting halls are available and, in fact, have been utilized by the Union. The Union's organizational campaign among the employees of the Employer had been in full swing at least since January, 1949. Union literature was being handed out to the employees on the sidewalk in front of the employees' entrance to the store almost daily. Several union meetings were held at union headquarters and in various neighboring hotels at which numerous employees attended. Union meetings and handing out union literature to employees at the employees' entrance were maintained both before and after the Employer's speech which took place on September 9th, six days before the election. The Union had sufficient opportunity and, in fact, did reply to the Employer's speech (R. Vol. I, 137a-143a, 150a-151a).

Certainly the instant case is not one where access to employees could be had only on company premises and therefore access must be afforded to organizers to company premises. In the instant case the no-solicitation rule did not prevent outside organizers from having access to the employees outside of the company premises and company time. Therefore the right of access by union organizers on company premises, as applicable to the Employer, does not exist, for that right exists only where no access outside of company premises is possible. It is also relevant to point out that even in the company town and lumber camp class of cases, the Board and the Courts have not held that union organizers may campaign among the employees on company time. To afford union organizers access to employees on company premises and time when such access can be had outside of company premises is to engraft an entirely new doctrine than the one applicable to cases of employee isolation. This new doctrine is that of equality of propaganda facilities, which is made explicit in the Board's decision. The Court below professes to frown upon the Board's doctrine of equality of opportunity: "If Bonwit Teller were to abandon that rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time Rudolph made an anti-union speech. Nothing in the Act nor in reason compels such 'an eye for an eye, a tooth for a tooth' result so long as the avenues of communication are kept open to both sides." Nevertheless, the Court does in fact incorporate in its holding the doctrine of equality of opportunity:

> "The Board, however, has allowed retail department stores the privilege of prohibiting all solicitation within the selling areas of the store during both working and non-working hours * * *. Bonwit Teller chose to avail itself of that privilege and having done so, was, in our opinion required to abstain from campaigning against the Union on the same premises to which the Union was denied access; if it should be otherwise, the prac-

tical advantage to the Employer, who was opposed to unionization, would constitute a serious interference with the rights of employees to organize."

The Court, in effect, holds that no facility for propagandizing employees at the disposal of the Union can ever equal that of the employer who exercises his constitutional right to free speech by addressing his employees on company time and premises, and therefore the same facilities must be extended to the union, even though the union, as in the instant case, had abundant opportunity for access to employees outside of company premises. There is no factual basis for the Court's assumption nor is there constitutional or statutory authority for the doctrine of equality of facilities. We know of no statutory or judicial rule which imposes an obligation on a publisher of a newspaper to extend the columns of his newspapers for reply to any candidate or to the proponents of any set of ideas which have been the target of adverse editorial comment by that publisher.

In the Presidential election just held, it was common knowledge that in terms of circulation about 85% of the newspapers favored the Republican candidate.

There is one exception to the rule that freedom of speech does not imply equality of facilities, that is, radio broadcasting. Under the relevant statute,[3] if a station owner permits a candidate for public office to use a broadcasting station he must afford equal opportunity to all other such candidates for that office in the use of such broadcasting station.

Because radio broadcasting is, by its technological imperatives, limited as to time and channels of communications, it is amenable to monopoly control and it therefore obviously stands in a pecular position among the avenues of mass communications, but please note, that even in re-

[3] 48 Stat. 1064-1105 (1934) as amended, 47 U. S. C. Secs. 151-5, 201-22, 301-29, 351-62, 401-16, 501-6, 601-9 (1946), 47 U. S. C. Secs. 154, 326, 402 (Supp. 1951).

gard to radio broadcasting the doctrine of equal facilities is not of administrative nor of judicial, but of Congressional origin.

By addressing the employees on company time and premises, the employer does not obtain a monopoly in propaganda facilities, where, as in this case, access by union organizers to employees can be had outside company premises. The union is not prevented from using its own facilities.

The Employer's obligation of non-interference does not impose upon him an obligation to aid unionization by affording a forum to the Union at the Employer's expense, where access to employees is feasible outside of the company premises as in the instant case. To impose such obligation is to abridge the employer's constitutional guarantee of free speech. The union has no more right of access to such a forum at the expense of the employer than the employer has to the columns of the union paper or union meeting halls.

Since there was no duty to afford access to union organizers to the store of the Employer, therefore, there was no discriminatory application by the Employer of the no-solicitation rule when Rudolph addressed the employees. The no-solicitation rule would have been discriminatorily applied if the Employer had afforded one union the right to solicit while denying it to its rival. It cannot be applied as against the Employer's right to free speech by the fictitious device of conceiving the Employer as candidate in an employee election, for in so doing, the Employer is deprived of free speech.

The prohibition against the discriminatory application of a no-solicitation rule is grounded on the statutory duty of the employer not to interfere in the self-organization of employees. It follows therefore that the prohibition, which is of statutory origin, cannot supersede and abridge the employer's constitutional right to free speech. Moreover, as indicated, the Congressional history is clear that Section 8(c) of the amended Act was intended to remove any and

all statutory obstacles in the way of the employer's constitutional right to address his employees on company time and premises. There is no longer even colorable statutory basis for invoking the prohibition against a discriminatory application of a no-solicitation rule to curtail the employer's constitutional right to address his employees on company time and premises.

This case, on the main issue of free speech under Section 8(c), is the first to be decided in the courts. However, its decision is in conflict with a decision of the Eighth Circuit Court on the same issue under the original National Labor Relations Act. In *N. L. R. B.* v. *Montgomery, Ward & Company*, 157 F. 2nd 486, at 499, the 8th Circuit Court found that the employer did not commit an unfair labor practice even under the original National Labor Relations Act when it convoked an employee audience on company time and property.

See also *Public Utilities Commission of the District of Columbia* v. *Pollack*, 72 S. C. 813.

The urgent need to clarify the issue involved is demonstrated not only by the conflict between the Circuit Courts but by the confusing position of the Board which is in conflict with that of the Court below. As already indicated, the Board at first, in the *S & S Corrugated* case held that an employer may address his employees on company time and premises without according a similar opportunity to the union. Then, in the instant case, it reversed itself, citing as grounds for its decision, the no-solicitation rule, the commission of unfair labor practices and the "proximity of the speech to the day of the election". However, both before and after the Circuit Court's decision in the instant case, the Board has applied the doctrine of the instant case even where these factors including the no-solicitation rule, did not exist. *Biltmore Manufacturing Co.*, 97 NLRB No. 128; *Bernardin Bottle Cap Co.*, 97 NLRB No. 241; *The Water Co.*, 101 NLRB No. 69; *Wilson & Co.*, 100 NLRB No. 242; *John Irving Stores of Chicago*, 101 NLRB No. 21; *Foreman & Clark, Inc.*, 101 NLRB No. 12.

By its decision in the instant case this Court can clarify the obscurantism and dissipate the uncertainty now prevalent in regard to the scope of employer-employee right to free speech in labor relations—an intrinsically important sector of civil liberties in our industrial society.

2. The Court below affirmed the Board's ruling that the Employer committed an unfair labor practice by refusing the Union an opportunity to address the employees on company time and premises. If this Court should find that this action of the Employer does not constitute an unfair labor practice, then it is respectfully submitted that the Employer's act should not be sufficient reason for setting aside the election since it was not of the kind to deprive the employees of freedom of choice in the election.

Since in representation proceedings the Board's decision is not directly subject to judicial review, *American Federation of Labor* v. *NLRB*, 308 U. S. 401, the Board can, indeed has, with impunity disregarded the mandate of Congress that an employer may exercise his constitutional right to free speech in labor relations. *General Shoe Corp.*, 77 NLRB 124; *Metropolitan Life Insurance Company*, 90 NLRB 935; *Biltmore Manufacturing Co.*, 97 *N. L.* R. B. No. 128; *Bernardin Bottle Cap Co.*, 97 N. L. R. B. No. 241. As the dissenting Board members concluded in the *General Shoe Corp.* case:

> "* * * It is paradoxical, to say the least, that now, after Congress has so strongly rejected the Board's prior construction of the Act in its relation to the Constitutional guarantee of free speech, that this Board should construe privileged expressions of opinion as creating an atmosphere which prevents employees from freely expressing their choice of representatives in a Board-conducted election. If the expression or dissemination of views, arguments, or opinion by an employer is to be afforded the full freedom which the amended Act envisages, it follows that the Board cannot justify setting aside elections merely because the employer avails himself of the protection which the statute specifically provides" (p. 131).

Since the instant case is a consolidated complaint and representation proceeding, the Court has opportunity under Section 9(d) of the Act to eliminate the practice developed by the Board to circumvent Section 8(c) of the Act and the *American Tube Bending* decision.

3. The Court erroneously ruled that a vacancy in the post of General Counsel during a substantial portion of the hearing did not render the instant proceedings void and nugatory. Its decision is predicated on the proposition that "before his resignation the General Counsel had delegated to his representative at a hearing authority to prosecute a complaint. We find no impropriety to such a procedure and hold that objection to it was properly overruled." This proposition betrays the fallacious reasoning that delegated powers to a subordinate officer can endure after the power of the superior officer or principal is terminated. This is obviously untenable.

Counsel for the Employer made a motion at the conclusion of the hearing to dismiss the proceedings on the ground that there was a vacancy in the post of General Counsel during a substantial part of the hearing. On September 18, 1950 the then General Counsel of the Board withdrew authority from the staff to issue complaints.

Congress adjourned September 23, 1950, and the present General Counsel received his interim appointment subsequent to the closing of the hearing in the case.

It is first important to observe that Section 3(d) does not make provision in regard to a vacancy as does Section 3(b) in regard to a vacancy on the Board. This failure is not an oversight but shows a definite Congressional intent to carry out its purpose of separating the prosecuting functions from the decisional or quasi-judicial functions which were coalesced in the old Board under the Wagner Act. As enumerated in Section 3(d) of the Act the statutory functions entrusted to the General Counsel alone include final authority in respect of the investigation of charges

and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board. This is made crystal clear by the Congressional history of the Taft-Hartley Act:

> "The General Counsel is to have general supervision and direction of all attorneys employed by the Board (excluding the trial examiners and the legal assistants to the individual members of the Board), and of all the officers and employees in the Board's regional offices, and is to have the final authority to act in the name of, but *independently of any direction, control or review by the Board* in respect of the investigation of charges and the issuances of complaints of unfair labor practices, and *in respect of the prosecution of such complaints, before the Board* * * *." (Italics supplied.) (House Conference Report No. 510 on H. R. 3020, Legislative History of the Labor Management Relations Act, 1947, p. 541.)

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, N. Y., December 19, 1952.

DRECHSLER & LEFF,

By SIDNEY ORENSTEIN,
Attorneys for Bonwit Teller, Inc.

SIDNEY ORENSTEIN,
MORTIMER HOROWITZ,
DAVID DRECHSLER,
of Counsel.

APPENDIX

The relevant provisions of the Labor-Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. Secs. 141, et seq.) are as follows:

"Sec. 3(b). The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

"Sec. 3(d). There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board Members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

"Sec. 8(c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"Sec. 9(d). Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant

to subsection (e) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 515

BONWIT TELLER, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. II, 100-109) is reported at 197 F. 2d 640. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 2a-21a) are reported at 96 NLRB 608.

JURISDICTION

The decree of the court below was entered on October 15, 1952 (R. II, 112). The petition for a writ of certiorari was filed on December 27, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 20-23.

QUESTIONS PRESENTED

1. In the operation of its department store, the employer validly promulgated and enforced a rule against union solicitation on the selling floors during the employees' non-working time as well as during their working time. On the main selling floor, during time that would otherwise be devoted to work, the employer delivered a speech to the employees urging them to vote against union representation. The employer denied the union's request for an opportunity to address the employees under comparable circumstances. The question presented is whether the employer discriminatorily applied its no-solicitation rule by addressing its employees during working time on the selling floor while denying the union a similar opportunity to address the employees on the employer's premises.

2. Whether the discriminatory application of the employer's no-solicitation rule was properly put in issue and litigated before the Board.

3. Whether an order of the Board setting aside the results of an election, which is not otherwise reviewable as a "final order" under Section 10 (f) of the Act, may be judicially reviewed merely because the representation proceeding on objections to the election was consolidated with the unfair labor practice proceeding for the purpose of hearing only.[1]

4. Whether an unfair labor practice hearing, begun during the incumbency of the General Counsel of the Board, may validly be continued and completed after his resignation and before the ap-

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[1] Petitioner's question numbered 5—"Whether employer utterances, which do not constitute unfair labor practices, may, nevertheless, constitute reasons for setting aside a representation election"—is not presented. First, the court below did not reach the Board's reasons for setting aside the election, because it held that the order setting aside the election "was not a final order reviewable under Section 10 (f) of the Act" (R. II, 101). Secondly, the Board set aside the election for conduct on the employer's part which the Board found in every instance to be unfair labor practices and not for conduct which was not found to constitute unfair labor practices. While the court below reversed the Board's findings in some respects, it agreed with the Board that the employer applied its no-solicitation rule discriminatorily, and this unfair labor practice is, in the Board's view, alone enough to warrant setting aside the election. Hence, the record does not present any question whether conduct other than unfair labor practices suffices to invalidate an election.

pointment of his successor, where the General Counsel, before his resignation, had delegated to the attorneys on his field staff the authority to prosecute cases.

STATEMENT

Petitioner operates a retail store specializing in women's apparel in New York City, and a branch store in White Plains, New York (R. I, 24a, 60a-61a, R. II, 94). Following organizational activity among the petitioner's employees in the early months of 1949, representation proceedings involving these stores were initiated with the Board and an election was held on June 30, 1949 (R. I, 25a; R. II, 76-78, 79). Two labor organizations participated, the Amalgamated Clothing Workers of America, CIO, and the Retail Clerks International Association, AFL, herein called "the Union" (*ibid.*). The election proved inconclusive with neither the Union, which polled 446 votes, the Amalgamated Clothing Workers, which received 156 votes, nor the 305 employees who voted for no union, obtaining a majority of the votes (R. I, 26a; R. II, 80). Accordingly, the Board directed a run-off election, eliminating Amalgamated from the ballot (*ibid.*).

Efforts to organize petitioner's employees by the Union were confined, because of the rigid enforcement of petitioner's no-solicitation rule, to activities carried on outside the employees' place

of work (R. I, 7a, 25a, 27a; R. II, 16-17, 44, 64). Under its no-solicitation rule, petitioner prohibited union activities of any kind on the selling floors or elsewhere in its stores, whether or not carried on during the non-working time of the employees involved, and whether or not carried on by outside union organizers or by the employees themselves[2] (*ibid.*). Thus, whenever representatives of the Union attempted to enter the stores to contact employees, petitioner promptly ejected them (R. I, 7a, 27a; 99a, 128a, 130a, 143a). The effect of petitioner's no-solicitation policy was to force the Union, in its organizational work, to rely solely on such media as union literature which might be handed to the employees as they entered or left the store, attempts to talk briefly with employees about the Union at those times, and organizational meetings held in the evenings at rented halls (R. I, 99a, 117a, 121a, 128a, 133a, 135a, 139a-143a, 150a-151a).

On Friday, September 9, 1949, six days before the run-off election, petitioner closed the New York store at 5:00 p.m., one-half hour earlier than the normal closing time, and the employees were invited by their superiors to attend a meeting on the main selling floor (R. I, 27a; R. II, 11-12, 20-22, 34, 36, 48, 56, 61, 62). After the employees had

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[2] The statement in the petition (p. 12) that "the no-solicitation rule did not apply to union organizers who were employees" is inaccurate (R. II, 16-17, 21, 44, 64).

assembled, Roy Rudolph, president of petitioner, delivered a speech in which he strongly condemned the Union, which he accused of campaigning by "vicious insinuations and promises" (R. I, 181a), and advised the employees to vote against the Union in the coming election (R. I, 27a; 180a-184a, R. II, 12-13). The day after this speech at the New York store, President Rudolph repeated it under similar circumstances at the White Plains store (R. I, 28a; R. II, 60).

On Monday, September 12, the Union notified petitioner by registered mail that it had been informed of President Rudolph's talk to the New York store employees, and requested an opportunity to reply under similar circumstances "so that [the Union] will be assured of the same complete audience of which you availed yourself" (R. I, 42a; R. II, 88-89). Petitioner did not acknowledge the letter (R. I, 42a-43a).

The run-off election occurred on September 15, 1949, and resulted in the defeat of the Union, which received 225 votes, in comparison with 446 it had received in the initial election in the preceding June (R. I, 26a, 32a). Following the election, the Union filed with the Board both objections to the election, in which it asserted that petitioner had improperly interfered with the free choice of its employees (R. II, 81-87), and an unfair labor practice charge, in which it alleged that the same conduct by petitioner constituted a vio-

lation of Section 8 (a) (1) of the Act (R. I, 64a-66a). When the complaint was issued on the charge, the unfair labor practice case was consolidated with the representation case for the purpose of holding a hearing to adduce evidence relative to the complaint and the objections to the election, both of which were based on the same conduct by petitioner (R. I, 58a-59a).

The Board found that petitioner's refusal to grant the Union's request for an opportunity to reply to President Rudolph's pre-election speech, under circumstances similar to those attending its delivery, constituted a violation of Section 8 (a) (1) of the Act. In the Board's view "the net result of [petitioner's] denial of the Union's request was to apply a no-solicitation rule discriminatorily" (R. I, 7a). The Board agreed that department stores, unlike most places of employment, were privileged to forbid union solicitation on selling floors even during non-working time (R. I, 7a-8a). But for the employer to prohibit "the use of his premises for union solicitation, while itself utilizing such premises as a forum for solicitation against the union," is to engage in "discriminatory enforcement" of the rule (R. I, 8a). The discrimination, the Board held, is particularly telling in a retail department store, for employees may properly be forbidden to engage in union solicitation in the selling areas even during non-working time, a restriction which does not

prevail in other enterprises, with the result that organizational activity is "under a practical disadvantage . . . not sanctioned in other types of business operations" (R. I, 8a). Such "special privilege . . . gives rise to an equal obligation to assure that such rules are enforced with an even hand" (R. I, 8a-9a). Apart from the discriminatory enforcement of the no-solicitation rule, as an alternative basis for decision, the Board held that "an employer who chooses to use his premises to assemble his employees and speak against a union may not deny that union's reasonable request for the same opportunity to present its case, where the circumstances are such that only by granting such request will the employees have a reasonable opportunity to hear both sides" (R. I, 9a). The Board concluded that in the "particular circumstances" of this case, "the only reasonable opportunity the employees could have had to hear the Union's reply was by [petitioner's] granting the Union's request to address the employees under the same advantageous circumstances as [petitioner] had made available to itself" (R. I, 10a).[3]

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[3] The Board also found that petitioner's representatives made statements to employees containing promises of benefit and threats of reprisal to dissuade them from voting for the Union (R. I, 4a-5a, 6a-7a, 32a-41a). The court below reversed the Board in these findings (R. II, 105-107), and they are no longer in issue.

The Board entered an order requiring petitioner to cease and desist, "During an organizational campaign by a labor organization," from "making anti-union speeches to [petitioner's] employees during working hours and on [petitioner's] premises, without according, upon reasonable request, a similar opportunity to address the employees to the labor organization against which such speeches are directed" (R. I, 14a-15a). The Board also entered an order setting aside the results of the election (R. I, 16a).

The court below agreed with the Board that petitioner's failure to grant the Union's request for an opportunity to reply on petitioner's premises to its president's speech to the employees was a "discriminatory application of the no-solicitation rule" (R. I, 109). It disagreed with the Board that, absent the no-solicitation rule, petitioner was "required to accord the Union a similar opportunity to address the employees each time [it] made an anti-union speech," its view being that if petitioner "were to abandon that rule," the "avenues of communication" would thereby be "kept open to both sides" without the need for permitting the Union to respond to the employer's speech on the employer's premises (R. II, 109). The court below, therefore, remanded the case to the Board to modify its order in accordance with the court's opinion (R. II, 109). The court did not review the Board's

order setting aside the election, holding that it was not a reviewable "final order" within the meaning of Section 10 (f) of the Act (R. II, 101).

ARGUMENT

1. Petitioner promulgated and enforced a no-solicitation rule prohibiting organizational activity among the employees in the selling areas of the store even during their non-working time. Although such a restriction would ordinarily be invalid (*Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793), the Board privileges it in a department store because "solicitation, if carried on on the selling floor, where customers are normally present, might conceivably be disruptive of . . . business." *May Department Stores Stores Co.,* 59 NLRB 976, 981. Furthermore, as the court below noted (R. II, 108, note), petitioner's "no-solicitation rule was not restricted to the selling areas alone, for there was testimony that union organizers were driven out of other portions of the premises when they were attempting to solicit employees." The consequence was that organizational activity among the employees was not carried on within the store but was confined primarily to activity off the premises (*supra.* pp. 4-5). Yet, as the court below observed (R. II, 108), "the place of work has been recognized to be the most effective place for the communication of information and opinion concerning unionization."

While effectively forbidding organizational activity in favor of the Union even during non-working time within the selling areas of the store, and elsewhere on the premises as well, petitioner itself used the main selling floor during working time to deliver a speech against the Union. Petitioner closed its store one-half hour earlier than the usual closing time; asked the employees to assemble on the main selling floor; and with customers still in the store completing their shopping (R. II, 34, 39, 61), petitioner's president made his anti-union speech (*supra*, pp. 5-6). Thus, to campaign against the Union, petitioner used the very facilities which it denied the employees for soliciting on behalf of the Union. It has long been settled that, however valid a no-solicitation rule may be on its face, its discriminatory application is unjustified.[4] As the court below observed (R. II, 108), to permit an employer to avail himself of the privilege of forbidding solicitation in favor of the Union, while at the same time allowing him to

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[4] *National Labor Relations Board* v. *Peyton Packing Co.*, 142 F. 2d 1009, 1010 (C.A. 5), certiorari denied, 323 U.S. 730; *National Labor Relations Board* v. *Gallup American Coal Co.*, 131 F. 2d 665, 667 (C.A. 10); *National Labor Relations Board* v. *William Davies Co.*, 135 F. 2d 179, 181 (C.A. 7), certiorari denied, 320 U.S. 770. Cf. *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 233; *National Labor Relations Board* v. *Fairmont Creamery Co.*, 143 F. 2d 668, 671 (C.A. 10), certiorari denied, 323 U.S. 752; *National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. 2d 410 (C.A. 10).

campaign "against the Union on the same premises to which the Union was denied access," would "constitute a serious interference with the right of his employees to organize."

Petitioner concedes (Pet., p. 16) that the "no-solicitation rule would have been discriminatorily applied if the Employer had afforded one union the right to solicit while denying it to its rival." It contends, however, that to invoke the same principle against a campaign by the employer in opposition to a union is to indulge "the fictitious device of conceiving the Employer as candidate in an employee election . . . . " But where, as here, the employer injects himself as an active partisan in the contest over unionization, the actual fiction would be to treat him as if he were a neutral. Compare *National Labor Relations Board* v. *American Furnace Co.,* 158 F. 2d 376, 379 (C.A. 7).

Petitioner contends in effect that to require it either to relinquish its no-solicitation rule or to give the Union an opportunity to reply on store premises to a speech against it delivered by petitioner on its premises is an alternative which contravenes Section 8 (c) of the Act. Section 8 (c) provides that the uncoercive expression or dissemination of "views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . ." But as the court below held (R. II, 108), in agreement with the Board (R. I,

13a-14a), "neither § 8 (c) nor any issue of 'employer free speech' is involved in this case." The heart of petitioner's offense is its disparate allocation of premises and facilities, not its speech or the manner in which it assembled its audience. To fail to restore the balance disturbed by petitioner would be, not to safeguard the employer's right to speak against union representation, but to diminish the employees' parallel right to proselytize in favor of union representation.[5]

Petitioner urges that the employees' organizational rights are sufficiently safeguarded by the availability in large metropolitan areas of outside meeting halls (Pet., pp. 13-15). But this factor is irrelevant where, as here, the issue is the discriminatory enforcement of a no-solicitation rule. For were this not a department store, petitioner could not validly forbid union solicitation on its premises during non-working time, even if "solicitation away from company property [were not] ineffective to reach prospective union members." *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798-799; see also p. 801. Consequently, petitioner cannot justify the dis-

[5] Contrary to petitioner's claim (Pet., p. 17), there is no conflict between the decision below and *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486 (C.A. 8). The latter case holds that it is not an unfair labor practice for an employer to compel employees on company time and property to listen to an anti-union speech. Discriminatory enforcement of a no-solicitation rule was not involved.

criminatory enforcement of its no-solicitation rule on a ground which would not warrant the adoption of the rule in the first place. The availability of outside organizational facilities could be relevant only to the Board's alternative holding that, apart from the no-solicitation rule, petitioner was obliged in the circumstances of this case to grant the Union an opportunity on petitioner's premises to reply to the speech of its president (*supra*, p. 8). But since this alternative ground for decision was rejected by the court below (*supra*, p. 9), no question in this respect is now presented in this case.[6]

2. Petitioner contends that "the Board's and the Court's decisions on the point of the no-solicitation rule are procedurally defective because [this] issue . . . was not lodged in the complaint, [or] in the charge . . . [and] evidence relating to the no-solicitation rule was specifically excluded by the Trial Examiner" (Pet., p. 11). The complaint alleged that petitioner refused "to give the Union an opportunity to address its employees, although requested to do so, in a manner similar to that in which [petitioner's] president addressed its employees . . ." (R. I, 62a). The rela-

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[6] Petitioner urges the Board's continued adherence to its alternative holding in other cases as a reason for granting the writ in this case (Pet., p. 17). The presence of the issue in other cases does not make it a question presented in this case.

tionship of the no-solicitation rule to this allegation was fully litigated at every stage of the proceeding before the Board and the court below. The evidence excluded[7] by the examiner (R. I, 104a-114a) pertained to the validity of the no-solicitation rule, which the Board did not dispute (R. I, 43a), and not to the relevance of the rule to petitioner's denial of the Union's request to address the employees on the store premises, which was litigated fully. The question therefore was adequately pleaded and litigated, and petitioner does not claim that it was prejudiced in any way.

3. Although petitioner concedes (Pet., p. 18) that "in representation proceedings the Board's decision is not directly subject to judicial review," it nevertheless asserts that this Court now "has opportunity under Section 9 (d) of the Act" to review the Board's order setting aside the election because "the instant case is a consolidated complaint and representation proceeding" (Pet., p. 19). But as the court below held in rejecting petitioner's request to review this order, "it is clear that we have no power to do so, *AFL* v. *N.L.R.B.*, 308 U.S. 401; *N.L.R.B.* v. *La Salle Steel*

[7] While the evidence was excluded for the purpose of the unfair labor practice case, it was not excluded from the record, for the ruling was "that this evidence is within the scope of the objections to the election, but that it is not within the scope of the complaint" (R. I, 114a).

Co., 7 Cir., 178 F. 2d 829, 832 n. 1, because the order was not a final order reviewable under Section 10 (f) of the Act.'"[8] Section 9 (d), in conjunction with Section 10 (f), provides for judicial review of representation determinations only when "an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to [Section 9 (c)]." The Board's determination to set aside the election, since that determination is not the basis for the unfair labor practice order "made pursuant to section 10 (c)," is not reviewable under Section 9 (d). The consolidation of the representation and unfair labor practice proceedings for hearing, which was done to conserve time and expense, does not change an otherwise unreviewable order into a reviewable one.

4. Because the General Counsel of the Board resigned during the course of the hearing in this case, petitioner contends that the attorney in the office of the General Counsel who thereafter continued to prosecute the case lacked authority to do so, and that the entire proceeding is therefore

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[8] See also, *National Labor Relations Board* v. *Thompson Products*, 162 F. 2d 287, 298, 301 (C.A. 6); *Big Lake Oil Co.* v. *National Labor Relations Board*, 146 F. 2d 967, 970 (C.A. 5); *E. I. DuPont de Nemours & Co.* v. *National Labor Relations Board*, 116 F. 2d 388, 401 (C.A. 4), certiorari denied, 313 U.S. 571.

"void and nugatory" (Pet., p. 19). Petitioner did not, however, object to the continuation of the hearing as soon as the General Counsel resigned, but deferred his objection until the reception of the evidence before the trial examiner had been concluded, and then for the first time sought to have "the entire proceeding [set aside as] a nullity" (R. I, 178a). For this reason alone petitioner's objection fails, for "orderly procedure and good administration require that objections to the proceeding of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

Petitioner's objection is in any event without merit. Petitioner invokes Section 3 (d) of the Act, which states that there "shall be a General Counsel of the Board" and that he "shall have final authority . . . in respect of the . . . issuance of complaints under section 10, and . . . the prosecution of such complaints. . . ." It is believed that the authority conferred is not attached to the particular occupant of the office to be exercised by him personally, but is lodged in the office itself. Accordingly, the authority to prosecute the hundreds of unfair labor practice cases handled by the General Counsel's office each year, like this one, is

delegated to attorneys employed in that office.[9] Such delegated authority, derived from the power vested in the office of the General Counsel, does not depend on the fortuitous circumstance of continuity in service by the individual in charge of the office. For where, as here, "there is a continuing duty irrespective of the incumbent" to discharge the obligations of a public office, "there is no sense or reason in allowing [an action instituted by that office] to abate by the change of individuals in the office." *Thompson* v. *United States,* 103 U.S. 480, 483-484. See also, *Gorham Mfg. Co.* v. *Wendell,* 261 U.S. 1, 4; *Irwin* v. *Wright,* 258 U.S. 219, 224; *Marshall* v. *Dye,* 231 U.S. 250, 255. And the purpose of Section 3 (d), to effect a separation of prosecuting and adjudicatory functions within the agency, is not impaired by permitting a prosecution begun during the incumbency of the General Counsel to be continued and completed after his resignation during the temporary vacancy of the office.

Finally, the application of Section 3 (d) of the Act to "the special and unusual circumstances present here" (R. I, 4a) does not present a question warranting review.

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[9] The Description of Organization, setting forth the delegation of authority to field employees within the office of the General Counsel, is found in 13 Fed. Reg. 3090, 3091-3092 (Redesignation of some sections in 13 Fed. Reg. 6266). See also, Statements of Procedure, National Labor Relations Board Rules and Regulations, Series VI, as amended, Sec. 101.10.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

BERNARD DUNAU,
DUANE BEESON,
Attorneys,
National Labor Relations Board.

FEBRUARY, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151 *et seq.*), are as follows:

National Labor Relations Board

* * * * * *

Sec. 3 (d). There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

* * * * * *

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage

in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * *

REPRESENTATIVES AND ELECTIONS

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Sec. 9 (d). Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section

and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

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PREVENTION OF UNFAIR LABOR PRACTICES

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Sec. 10 (f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the

order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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